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October 28, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: IB Docket No. 95-59 -- Second Further Notice of Proposed Rulemaking on the Preemption of Local Zoning Regulation of Satellite Earth Stations

Dear Mr. Caton:

Transmitted herewith, on behalf of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. is an original and 11 copies of their Reply Comments in the above-referenced docket.

If you have any questions concerning this matter, please let me know.

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

Counsel for Philips
Electronics North America
Corporation and Thomson
Consumer Electronics, Inc.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

REPLY COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

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October 28, 1996

Executive Summary of Reply Comments by Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. in IB Docket No.95-59

Section 207 of the Telecommunications Act of 1996 instructs the Federal Communications Commission to issue regulations prohibiting restrictions that "impair a viewer's ability to receive" programming services via the use of DBS dish antennas, and over-the-air broadcast and wireless cable antennas. Congress clearly stated its intent that this section preempt private contractual restrictions on the use of DBS dish antennas and there should be no doubt that the Commission's rules implementing this section should apply to tenants and unit owners in community associations. Section 207 was designed to provide all viewers with access to alternative sources of video programming by eliminating artificial and anti-competitive barriers to new technologies such as direct broadcast satellite (DBS).

Both Congress and the Commission have the legal authority to preempt private contractual restrictions on the use of DBS dish antennas by tenants and community association unit owners. Preempting such restrictions pursuant to Section 207 is not an unconstitutional taking under the Fifth Amendment. The commenters that oppose an extension of the Commission's preemption rules to rental properties and residential situations in which commonly owned property is involved (e.g., condominium complexes and community associations) base their assertions about the constitutionality of such rules on an erroneous factual premise. These commenters assume that to effectuate the mandate of Section 207 the Commission's rules must mandate third-party ownership and control of the DBS dish antennas and facilities or conversion of community property to the exclusive use of an

individual for placement of a DBS dish. After constructing this strawman, these commenters weave a tale of Fifth Amendment takings based on these false assumptions.

However, the Further Notice does not suggest that the Commission contemplates rules involving mandated third-party ownership nor do Philips and Thomson advocate such a position. In fact, providing tenants and unit owners with access to DBS services need not involve third party ownership of facilities. Philips and Thomson believe that the Commission's rules should require that landlords or community associations provide access to DBS services at the request of a tenant or unit owner. The new rules should provide landlords or community associations with considerable discretion in determining the means by which tenants or unit owners could be provided access to the DBS service of that tenant's or unit owner's choice based on the characteristics of the dwelling unit as long as tenants or unit owners could receive a quality service. If adopted, such rules would fulfill the mandate of Section 207 without implicating the Fifth Amendment.

Before the
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REPLY COMMENTS OF
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION AND
THOMSON CONSUMER ELECTRONICS, INC.

Philips Electronics North America Corporation ("Philips") and Thomson Consumer Electronics, Inc. ("Thomson") submit reply comments in the above-captioned Further Notice of Proposed Rulemaking ("Second Further Notice") to implement Section 207 of the Telecommunications Act of 1996.

Introduction

Section 207 of the Telecommunications Act of 1996[1/] instructs the Federal Communications Commission to issue regulations prohibiting restrictions that "impair a viewer's ability to receive" programming services via the use of DBS dish antennas, and over-the-air broadcast and wireless cable antennas. Congress clearly stated its intent that this section preempt private contractual restrictions on the use of DBS dish antennas

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1/ Telecommunications Act of 1996, § 207, Pub. L. No. 104-104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996)).

and there should be no doubt that the Commission's rules implementing this section should apply to tenants and unit owners in community associations. Section 207 was designed to provide all viewers with access to alternative sources of video programming by eliminating artificial and anti-competitive barriers to new technologies such as direct broadcast satellite (DBS).

Both Congress and the Commission have the legal authority to preempt private contractual restrictions on the use of DBS dish antennas by tenants and community association unit owners. Preempting such restrictions pursuant to Section 207 is not an unconstitutional taking under the Fifth Amendment. The commenters that oppose an extension of the Commission's preemption rules to rental properties[2/] and residential situations in which commonly owned property is involved (e.g., condominium complexes and community associations) base their assertions about the constitutionality of such rules on an erroneous factual premise. These commenters assume that to effectuate the mandate of Section 207 the Commission's rules must mandate third-party ownership and control of the DBS dish antennas and facilities or conversion of community property to the exclusive use of an individual for placement of a DBS dish.

2/ For purposes of these comments, the term "rental properties" include residential properties such as apartment buildings, condominium complexes, and single-family residences. We note that one commenter opposing an extension of the Commission's rules to rental properties also included shopping malls and office buildings in its discussion of rental properties. Joint Comments of the National Apartment Association et al. ("NAA Joint Comments") at 21.

After constructing this strawman, these commenters weave a tale of Fifth Amendment takings based on these false assumptions.

However, the Further Notice does not suggest that the Commission contemplates rules involving mandated third-party ownership nor do Philips and Thomson advocate such a position. In fact, providing tenants and unit owners with access to DBS services need not involve third party ownership of facilities. Philips and Thomson believe that the Commission's rules should require that landlords or community associations provide access to DBS services at the request of a tenant or unit owner. The new rules should provide landlords or community associations with considerable discretion in determining the means by which tenants or unit owners could be provided access to the DBS service of that tenant's or unit owner's choice based on the characteristics of the dwelling unit as long as tenants or unit owners could receive a quality service. If adopted, such rules would fulfill the mandate of Section 207 without implicating the Fifth Amendment.

I. Extending the Commission's Preemption Rules to Rental Property and Community Associations Need Not Require Ownership or Control of DBS Equipment by Third Parties.

In sharp contrast to the parade of horribles that some commenters suggest would result from an extension of the FCC's rules,[3/] Philips and Thomson envision that the Commission's new

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3/ See, e.g., Comments of Independent Cable & Telecommunications Association ("ICTA Comments") at 5; NAA Joint Comments at 25-29; Comments of the Community Associations Institute et al. ("CAI Comments") at 27-32. For a rebuttal of these assertions and a discussion of the technical feasibility of using a single DBS antennas to serve multiple households, see Philips and Thomson Comments at 14-17.

rules would only require that landlords or condominium associations provide access to DBS services at the request of a tenant or condominium unit owner. In other words, Philips and Thomson believe that the Commission can formulate a rule that provides access to tenants and unit owners that does not involve a government-mandated, third-party occupation of the landlord's or community association's property, but rather ownership of the DBS dish antenna by the property owner. As one opponent of extending the Commission's rules readily admits "ownership" of the installation by a landlord, tenant in common, or association would remove a situation from a Fifth Amendment takings analysis.[4/]

Philips and Thomson believe that the Commission's rules should provide landlords or condominium associations with considerable discretion in determining the means by which tenants or unit owners could be provided access to the DBS service of that tenant's or unit owner's choice based on the characteristics of the dwelling unit as long as tenants or unit owners could receive a quality service. For example, in the case of a high rise apartment, Philips and Thomson conceive that all tenants or unit owners who elect to subscribe to a particular DBS service would be able to access that programming through a single common DBS dish antenna on the rooftop provided by the landlord or condominium association. The signals could be distributed to individual units through wire using the same conduit utilized by

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4/ "It is clear landlord, tenant in common, or association **ownership** of the cable installation would remove the situation from the Loretto analysis." CAI Comments at 16 (emphasis added).

an incumbent cable or SMATV operator. In the case of attached low rise units, such as townhouses, the landlord or condominium association might elect to require the tenant or unit owner to place the DBS dish antenna in the yard, on the patio, on the roof of his or her unit, or some other exclusive use area, as long as the placement would not impair the viewer's ability to receive DBS service. A DBS service provider would have access to a rental property or commonly owned property in the case of a community association upon the invitation of the landlord or association in response to a request by a tenant or unit owner. The commercial provider's presence on the property would be conditional upon that invitation.[5/] Thus, whether the landlord or community association chooses to install and own its own DBS dish, to turn to a third-party provider, or some other reasonable alterative to make DBS services available would be at the discretion of the landlord or the association.

II. The Application of Section 207's Prohibition of Restrictions to Rental Property and Community Associations Does not Constitute a Taking in Violation of the Fifth Amendment.

Several commenters to the Further Notice erroneously assert that an extension of the Commission's rules implementing Section 207 to rental properties, including apartment buildings, or commonly owned property within, for example, a condominium complex, would constitute a regulatory taking in violation of the Fifth Amendment of the Constitution under Loretto v. Teleprompter

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5/ Under such circumstances, a DBS service provider would not be an "interloper" or, as one opponent asserts, seizing property pursuant to a statutory directive, since they would only provide their services upon a specific request or "invitation" by the landlord or community association. See ICTA Comments at 6, n. 7.

Manhattan CATV Corp., 458 U.S. 419 (1982).[6/] This assertion is based on the false premise that the only way the Commission could effectuate the requirements of Section 207 would be to mandate third-party ownership and control of DBS equipment on rental or commonly owned property. As discussed above, Philips and Thomson do not advocate government-mandated access to an owner's property by third-parties nor does the Further Notice propose such a rule.

After setting up the strawman premise of government-mandated, third-party ownership, these commenters analyze Section 207 under the precedent set in Loretto.[7/] Loretto, however, is inapposite here, because the Court's decision turned on the fact that the physical occupation of the landlord's property involved a third party, not the required provision of a service at the request of a tenant in the building where the landlord owned the installation. Loretto expressly states that a different question would have been presented to the Court if the state statute in question:

> required landlords to provide cable installation if a tenant so desires . . . since the landlord would own the installation. Ownership would give the landlord rights to placement, manner, use, and possibly the disposition of the installation. The fact of ownership is . . . not simply "incidental" . . ; it would give a

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6/ NAA Joint Comments at 4; ICTA Comments at 2; CAI Comments at 14.

7/ In Loretto, the Court held that a New York statute that required an apartment building owner to permit a cable television franchisee to place its wires on the owner's property constituted a per se taking of the owner's property without requiring just compensation. The Court determined that the statute mandated a permanent physical occupation of the owner's property by a third party without just compensation, thereby violating the Fifth Amendment rights of the building owner. Loretto, 458 U.S. at 419.

> landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The landlord would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation.[8/]

Opponents have attempted to obscure the Loretto Court's holding regarding third-party occupation, by assuming that the Commission's rules, if extended to rental properties and commonly-owned property, would require that DBS antennas be owned by a third-party, a tenant or a unit owner.[9/] As noted above, that is simply not the case and is not a position that Philips or Thomson advocates. As discussed above, Philips and Thomson envision that providing tenants and condominium unit owners with access to DBS services need not involve third party ownership of facilities.

Indeed, Loretto supports governmental authority to regulate the landlord-tenant relationship where no third-party occupation has been mandated. The Loretto Court affirmed that governmental entities "have broad power to regulate housing conditions in general and landlord-tenant relationships in particular without paying compensation for all economic injuries that such regulation entails."[10/] The Loretto Court expressly states that

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8/ Id. at 440, n. 19.

9/ See CAI Comments at 16; NAA Joint Comments at 6; ICTA Comments at 4. However, in making this assumption, CAI expressly concedes and NAA and ICTA impliedly concede that no takings would exist if the landlord owned the DBS installation.

10/ Id. at 440; see also Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding that where laws regulate the owner's use of land by regulating the relationship between landlord and tenant, no taking occurs).

its holding in that case does not alter the State's power to require landlords to "comply with building codes and provide utility connections, mailboxes, smoke detectors, [and] fire extinguishers . . . in the common area of a building."[11/] There is no reason to believe that the Court would treat a requirement that a landlord or condominium association install a DBS dish for common use by tenants or condominium unit owners in the building any differently.[12/]

One opponent also argues that the extension of the FCC's rules implementing Section 207 constitutes a taking since the Court in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895-96 (1992), has recognized that property may be taken without physical invasion if the government enacts a regulation that prohibits a landowner from realizing "economically beneficial or productive use of his land."[13/] However, any comparison to the Lucas case is absurd. In Lucas, the Court reviewed a state statute that prohibited landowners like Lucas from building on their beachfront property at all. The Court analyzed the statute in question under the Fifth Amendment to determine whether the state statute was a regulation that denied

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11/ Id. at 440.

12/ For a discussion of Congress' power to alter contractual relationships pursuant to its constitutional authority to regulate interstate commerce and the Commission's authority to modify private leasehold agreements to carry out Congressional intent, see Philips and Thomson Comments at 7-9.

13/ NAA Joint Comments at 11 (citing Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)).

the property owner "**all** economically beneficial uses" of his land and essentially left his property "economically idle."[14/]

In marked contrast to the landowner in the Lucas case who was completely foreclosed from building on his property, a Commission rule requiring that landlords and community associations provide tenants and condominium unit owners access to DBS services upon their request would not in any way prohibit the landowner from economically benefiting or using his land. To the contrary, such a requirement could in fact enhance the property's value by making it more attractive to tenants and unit owners and by providing an additional stream of revenue to the property owner. Philips and Thomson believe that the Commission's rules should specifically permit a landlord or community association to recover the costs of access to DBS services from tenants or unit owners and to enter into contractual agreements with commercial service providers that could include compensation for such services.[15/]

III. Opponents' Reliance on Bell Atlantic is Unfounded.

Opponents argue that the extension of the FCC's rules implementing Section 207 would be analogous to the circumstances in Bell Atlantic v. Federal Communications Commission, 24 F.3d 1441 (D.C. Cir. 1994). They suggest that the Bell Atlantic Court

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14/ Lucas, 112 S. Ct. at 2895-2901 (emphasis in the original).

15/ CAI notes in its comments that many of its members would be more willing to provide access to DBS and other service providers if compensated. CAI Comments at 23, n.8. This recognition seems to suggest that economic reasons, rather than aesthetic, health or safety concerns, drive the decisionmaking process of these associations with regard to which providers are given access to unit owners or tenants.

held that the Commission's requirement that local exchange carriers ("LECs") permit competitive access providers to connect their lines to those of the LECs ("physical collocation") was a taking under Loretto.[16/] However, the court in Bell Atlantic in fact held that the Commission could not impose a physical collocation requirement upon LECs because Congress had not expressly authorized such action.[17/]

The instant case is distinguishable from Bell Atlantic for two important reasons. First, the court in Bell Atlantic concluded that physical collocation implicated the Fifth Amendment because it required LECs to provide "**exclusive** use" of a portion of their facilities to third parties.[18/] Unlike Loretto and Bell Atlantic, this case does not involve a third party occupation of an owner's property. Philips and Thomson believe that the Commission's rules if extended to rental and commonly owned properties should permit landowners to maintain full authority over their property and to own the DBS antenna used to provide service to a requesting tenant or unit owner. Thus, commercial providers of DBS service would only be provided access to multiple dwelling units to install or maintain the DBS equipment at the request of a landlord or condominium association to accommodate the request for service from a tenant or unit

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16/ See e.g., NAA Joint Comments at 18; CAI Comments at 20.

17/ As the Commission itself acknowledges, this holding is now moot since the passage of Section 251(c)(6) of the Telecommunications Act of 1996, which expressly requires LECs to provide physical collocation. See First Report and Order ("Interconnection Order"), CC Docket No. 96-98, CC Docket No. 95-185 at ¶¶ 613-617 (August 8, 1996), 61 Fed. Reg. 45,476 (1996).

18/ Bell Atlantic, 24 F.3d at 1441.

owner and for the common benefit of all residents. A government-mandated, third-party occupation would not be involved at all under such circumstances.

Secondly, the court did not decide Bell Atlantic on Fifth Amendment grounds, but on its conclusion that the Commission did not have the statutory authority to impose physical collocation.[19/] In this case, Section 207 of the Telecommunications Act of 1996 expressly mandates the Commission to issue regulations that prohibit all restrictions that "impair a viewer's ability to receive video programming services" through DBS antennas. The Commission, therefore, not only has the statutory authority to extend the FCC's rules implementing Section 207 to include rental properties and community associations, but is mandated to do so.

IV. Florida Power Provides the Appropriate Analysis for this Case.

The Court's decision in Federal Communications Commission v. Florida Power Corp., 480 U.S. 245 (1987), provides the appropriate guidance to the Commission on the issue of landlord-tenant relationships. In Florida Power, the Court held that the Pole Attachments Act, which authorized the Commission to regulate the rates that utility-pole owners charged cable companies for space on the poles did not effect an unconstitutional taking of the pole owners' property.[20/]

The Court held that the case should not be governed by the analysis in Loretto noting that while "the statute . . . in

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19/ Id. at 1147.

20/ Id.

Loretto specifically required landlords to permit permanent occupation of the property by cable companies," the pole owners were not required by the Pole Attachments Act to allow installation of the cable on the poles.[21/] Rather, the public utility landlords had "voluntarily" entered into leases with cable company tenants.[22/] The Court found that the "invitation" made the difference and that "the line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license."[23/] The Court reaffirmed its characterization of the holding in Loretto as "very narrow" and reiterated that "statutes regulating economic relations of landlords and tenants are not per se takings."[24/]

The instant case presents a situation like Florida Power in which Congress determined to alter the relationship between a landlord and tenant by prohibiting a landlord or condominium association from denying access to DBS services. The means by which the Commission's rules achieve that directive need not mandate third-party occupation of the landlord's property or commonly owned property.

Conclusion

For the reasons stated above, the Commission should extend the rules implementing Section 207 to all viewers, including

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21/ 480 U.S. at 251.

22/ Id. at 252.

23/ Id. at 252-253.

24/ Id. at 252.

tenants and condominium unit owners. The Commission's rules should provide for sufficient flexibility so as to indicate the paramount rights of the viewer to access DBS services under Section 207 while minimizing the extent of intrusion on the property owner's management of the property.

Respectfully submitted,

PHILIPS ELECTRONICS N.A.

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